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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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Ronald J. Souza
Bruce E. Weisenberg
LYNCH, GILARDI & GRUMMER
A Professional Corporation
170 Columbus Avenue, 5th Floor
San Francisco, CA 94133
(415) 397-2800

The following is a brief summary of the significant employment law developments since our last newsletter.¹

WAGE & HOUR

Misclassification: Managers who supervise while performing nonexempt tasks are properly classified as nonexempt. *Heyen v. Safeway*. In this case, Safeway unsuccessfully argued that assistant store managers who had managerial responsibilities while they were at cashiering or bookkeeping should be classified as exempt. That is especially so where the employer's expectations require an otherwise exempt manager to take on nonexempt tasks as a result of their overall job duties. *Comment:* So if employees have managerial discretion/responsibilities at the same time that they are performing nonexempt tasks, that work will be classified as nonexempt.

SEXUAL HARASSMENT

Severe & Pervasive: Allegations that an employee who was shunned, disrespected, talked down to, yelled at in front of other employees and called "stupid" did not constitute actionable sexual harassment. *McCoy v. Pac. Maritime Ass'n*. Further, allegations of coworker harassment were not actionable because there was no proof that the employer knew or should have known of the conduct alleged. *Comment:* This is the latest in a series of cases which raised the bar

¹ This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein. *NOTE:* These cases have not been updated/cite-checked since they were first reported.

regarding what must be shown to establish "sexual harassment" under the law.

DISABILITY DISCRIMINATION

Qualified workers: An employee's disability discrimination case was dismissed where the employer proved that she was unable to perform the essential functions of her job. *Lawler v. Montblanc N. Amer.* In this case, the employee's psoriatic arthritis so debilitated her that she could not perform the job as a store manager. *Comment:* This is clearly not a new legal development. To be protected by either federal or California disability discrimination laws, an employee must be able to show that he/she could perform the essential functions of the job with/without reasonable accommodation.

STRATEGIC LAWSUITS AGAINST PUBLIC POLICY (SLAPP)

Cross-Complaints: After an employee sued a coworker for sexual harassment, the coworker filed cross-complaint for defamation. The court dismissed the cross-complaint on the employee's anti-SLAPP motion. *Aber v. Comstock*. The court here found that the employee's statements were privileged because they were made in connection with a matter under review by an official proceeding (e.g. statements to police, medical personnel, an H.R. manager). *Comment:* Defamation lawsuits in response to complaints alleging wrongdoing should be carefully considered. Losing an anti-SLAPP motion is expensive as it brings with it an award of the opposing parties' attorney's fees (ouch).

PRIVACY/ADA

Threatening Remarks: An employee's threatening comments and behavior during a

meeting with a supervisor were legitimate reasons to require the employee to take and pass a fitness-for-duty examination before returning to work. *Owusu-Ansah v. Coca Cola Co.* In this case, in a meeting with his supervisor, the employee became increasingly agitated, while complaining of harassment based on his nationality. He began banging his hand on the table and stated that “someone is going to pay for this” causing concern that the employee may harm a coworker. *Comment:* While this is a case from another state, it does demonstrate that courts will grant employers discretion in dealing with threats of workplace violence.

LABOR

NLRB Posting Rule: A federal court recently struck down the National Labor Relations Board (NLRB) notice-posting rule which would have required employers to conspicuously display a notice informing employees of their rights under the National Labor Relations Act. *National Association of Manufacturers v. NLRB.* The court invalidated the rule because it found all three of the rule’s enforcement mechanisms were unlawful. It also found that the rule exceeded the NLRB’s rulemaking authority as delegated by Congress. *Comment:* This decision is somewhat territorial in nature in that the court stops the NLRB from encroaching on court authority.

ARBITRATION

Employee Handbook Provision: An arbitration agreement contained in an employee handbook was not invalid simply because the employer could change the handbook in its discretion. *Serpa v. Calif. Surety Investigations.* The court held that the implied covenant of good faith and fair

dealing limited the employer’s right to alter the handbook agreement unilaterally. *Comment:* This case is at odds with other decisions on this subject. Employers would do well to have employees sign separate, irrevocable, arbitration agreements.

If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

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